

December 20, 2011

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Re: Your Request for Advice  
**Our File No. A-11-177**

Dear Mr. Green:

This letter is in response to your request for advice on behalf of Carpinteria Valley Water District (the “District”) board members Rene Van Wingerden and Matthew Roberts regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest.

### QUESTIONS

1. Does the Act prohibit Ms. Van Wingerden from voting to set irrigation water rates if she and her husband are joint beneficiaries of a trust that owns 30 acres of agricultural land and own a 50% interest in 14 acres of agricultural land if both properties are located within the District and are irrigated with District water? If yes, may she nevertheless vote under the “public generally” exception?
2. Does the Act prohibit Mr. Roberts from voting to set irrigation water rates if he, together with his wife, has a 9% interest in 56 acres of agriculture land if the land is located within the District and is irrigated with District water? If yes, may he nevertheless vote under the “public generally” exception?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## CONCLUSIONS

1 & 2. The “public generally” exception applies to each of Ms. Van Wingerden’s and Mr. Roberts’ situations and allows them to vote, despite a disqualifying conflict of interest.

## FACTS

The District, located in the southeast corner of Santa Barbara County, serves a population of 15,141 in a service area of approximately 11,280 acres. About 70% of the District’s service area is zoned for agriculture and approximately 50% of the District’s water usage is for agriculture. The District’s total number of accounts is currently 4,305. This number includes five temporary accounts for construction-site work, 119 fire-line accounts and 4,181 regular service accounts. Of the 4,181 regular service accounts, 3,752 are for municipal and industrial customers and 429 are for irrigation customers.

The District is governed by a five-person board of directors. June Van Wingerden is the board’s president and Matthew Roberts is the Vice President. Both are commercial growers who have irrigation accounts with the District.

Ms. Van Wingerden and her husband have an interest in two properties used for growing flowers. One property, totaling 94 acres, is owned by a trust in which they are the sole beneficiaries. This property includes thirty acres used for greenhouses and five residences. The property is serviced by five District water meters. The Van Wingerdens own a 50% interest in another 31 acres, also located within the District and used for growing flowers. This property is serviced by two District water meters. Ms. Van Wingerden and her husband receive income of more than \$2,000 from their flower growing business.

Mr. Roberts and his wife own a nine percent interest in 56 acres located within the District. Three trusts, in which neither Mr. Roberts nor his wife has an interest, own the remaining 91%. The sole beneficiary of each trust is Mr. Roberts’ mother. The property, which is used to grow avocados and cherimoyas, is serviced by two District water meters. Mr. Roberts and his wife receive income of more than \$2,000 from their orchard business.

## ANALYSIS

The Act’s conflict-of-interest provisions ensure that public officials will “perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental

decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

**Steps 1 and 2. Are Ms. Van Wingerden and Mr. Roberts “public officials” within the meaning of Section 87100 and will they be making, participating in making or influencing a governmental decision?**

The Act’s conflict-of-interest provisions apply to all “public officials.” (Section 87100, 87103; Regulation 18700(b)(1).) As elected members of the District, Ms. Van Wingerden and Mr. Roberts are “public officials.” (Section 82048.) Consequently, they may not make, participate in making, or otherwise use their official positions to influence any decisions that will have a reasonably foreseeable material financial effect on any of their economic interests. As members of the District’s board, they will be making a governmental decision when they vote to set irrigation water rates.<sup>2</sup>

**Step 3. What are the board members’ economic interests?**

The Act’s conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, inclusive:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a); Regulation 18703.1(a).)
- A public official has an economic interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an economic interest in any source of gifts to him or her

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<sup>2</sup> When a public official who holds an office specified in section 87200 has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5(c) and 18702.5(d) apply.

if the gifts total \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)

- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

## **Ms. Van Wingerden**

### Interests involving the trust.

Regulation 18234(a) provides that an official has an economic interest in the pro rata share of the interests in real property, sources of income and investments of a trust in which the official has a direct, indirect, or beneficial interest of 10 percent or greater. For purposes of determining whether an official has an economic interest in real property, sources of income, and investments of a trust, the official has a direct, indirect or beneficial interest in the trust if the official is a trustor or a beneficiary of the trust who possesses certain powers enumerated in Regulation 18234(c).

Because Ms. Van Wingerden is not the trustor, we turn to Regulation 18234(c)(2) to determine whether she meets the conditions, as a beneficiary, that would establish her economic interest in the trust’s real property. Regulation 18234(c)(2) provides that an official who is a beneficiary of a trust has an economic interest in real property, sources of income and investments of the trust if the beneficiary:

“(A) Presently receives income; or

“(B) Has an irrevocable future right to receive income or principal. For purposes of this subsection, an individual has an irrevocable future right to receive income or principal if the trust is irrevocable, unless one of the following applies:

“(i) Powers exist to consume, invade, or appoint the principal for the benefit of beneficiaries other than the official and such powers are not limited by an ascertainable standard relating to the health, education, support, or maintenance of the beneficiaries; or

“(ii) Under the terms of the trust, someone other than the official can designate the persons who shall possess or enjoy the trust property or income.” (Regulation 18234(b)-(c).)

You state that the trust owns real property on which flowers are grown and receives income from the commercial sale of the flowers. Therefore, the trust has an economic interest in real property and a source of income. Because the Van Wingerdens are presently receiving income from the trust, Ms. Van Wingerden has a pro rata (100%) economic interest in the real property and sources of income of the trust.

Interests not involving the trust.Real Property

Ms. Van Wingerden and her husband have a 50% interest in real property that they own outright. Thus, Ms. Van Wingerden has an economic interest in real property.

Business Entity

The property in which Mr. and Ms. Van Wingerden have a 50% interest is used for a flower growing business. Under Section 82005, the term “business entity” means any organization operated for profit, including a proprietorship, partnership, firm business trust, joint venture, syndicate, corporation or association. Because the flower business is operated for profit, Mr. Van Wingerden has an economic interest in the business.

Source of Income

You state that Ms. Van Wingerden receives income exceeding \$2,000 per year from the flower growing business. Thus, she has a source-of-income economic interest in the business and any sources of income of the business.

Personal Finances

A public official is considered to always have an economic interest in his or her personal finances. (Regulation 18703.5.) However, a financial effect on the value of real property owned directly or indirectly by a public official, and a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest, are not considered separate financial effects on the official’s personal finances and would not be analyzed separately under the “personal financial effects” rule. (Regulation 18705.5(a).) Accordingly, the personal financial effects rule does not appear to apply to Ms. Van Wingerden’s circumstances and we will not discuss it further.

**Mr. Roberts**Real Property

Mr. Roberts, his wife and his mother own, as tenants-in-common, 56 acres located within the District that is used for growing avocados and cherimoyas. Mr. Roberts owns 7.57%, of the property, his wife owns 1.5% and the balance is owned by three trusts in which neither Mr. Roberts, nor his wife, have an interest. The sole beneficiary of each trust is Mr. Roberts’ mother. Thus, Mr. Roberts has an economic interest in real property.

Business Entity

The property owned by Mr. and Mrs. Roberts is used to grow avocados and cherimoyas for commercial purposes. Thus, Mr. Roberts has an economic interest in a business entity.

### Source of Income

You state that Mr. Roberts receives annual income exceeding \$2,000 from his business. Thus, he has a source-of-income economic interest in the business and any sources of income of the business.

### Personal Finances

As stated above, a financial effect on the value of real property owned directly or indirectly by a public official, and a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest, are not considered separate financial effects on the official's personal finances and would not be analyzed separately under the "personal financial effects" rule. (Regulation 18705.5(a).) Accordingly, the personal financial effects rule does not apply to Mr. Roberts' circumstances.

**Step 4. Will the economic interests of Ms. Van Wingerden and Mr. Roberts be directly or indirectly involved in decisions they will make, participate in making or influence as public officials?**

### Real Property

Under Section 18704.2(a)(4), real property is directly involved in a governmental decision if:

- (4) The governmental decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.

Because both Ms. Van Wingerden's and Mr. Roberts' properties will be subject to the rate modification, their properties are directly involved in a decision to set irrigation water rates.

### Business Entity and Source of Income

Under Regulation 18704.1(a), a person, including a business entity and source of income, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

"(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

"(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person."

Neither Ms. Van Wingerden nor Mr. Roberts will be initiating the proceeding nor are they named parties in, or the subject of the proceeding. Accordingly, they are not directly involved. If a public official's economic interest is not directly involved, it is indirectly involved. (Regulation 18704(a).)

#### **Step 5. What is the applicable materiality standard?**

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).)

##### Real Property

Under Regulation 18705.2(a), the financial effect of a governmental decision on real property that is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property.

##### Business Entities and Sources of Income<sup>3</sup>

The applicable materiality standard for governmental decisions involving business entities is found in Regulation 18705.1. Subdivision (c) sets forth materiality standards for economic interests in business entities that are indirectly involved in a governmental decision, including those that are sources of income. (See Regulation 18705.3(b)(1). For relatively small businesses, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that the governmental decision will increase/decrease the business entity's annual gross revenues by \$20,000 or more, result in the business entity incurring/avoiding additional expenses or reducing/eliminating existing expenses by \$5,000 or more in a fiscal year or increase/decrease the value of the business entity's assets/liabilities by \$20,000 or more. (Regulation 18705.1(c)(4).)

#### **Step 6. Is it reasonably foreseeable that the financial effect of the board members' decision on their economic interests will meet the applicable materiality standard?**

An effect is considered "reasonably foreseeable" if the effect is "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) 198.) A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

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<sup>3</sup> For sources of income that are business entities, the applicable materiality standard is the same as the materiality standard for business entities. (Regulation 18705.3(b)(1).)

### Real Property

We see nothing in your facts that suggests that the presumption of materiality set forth in Regulation 18705.2(a) is rebutted. Therefore, a decision by the Board to set irrigation water rates is material and neither Ms. Van Wingerden nor Mr. Roberts may make, participate in making or attempt to use their official position to influence the decision.

### Business Entity and Sources of Income

Because Ms. Van Wingerden and Mr. Roberts are disqualified from participating in the Board's irrigation water rate decision as a result of their economic interests in real property, we do not address the decision's effect on their businesses or sources of income.

### **Step 7. "Public Generally"**

Even if a public official has a conflict of interest, the official you may still be able to participate in the decision under the "public generally" exception. A public official who determines that his or her economic interest will experience a material financial effect as a result of a governmental decision may nevertheless participate in the decision if the financial effect on his or her interest is not distinguishable from its effect on the public generally. (Section 87103, Regulation 18707.)

There is a special rule that applies to rates, assessments, and other similar decisions. The financial effect of a governmental decision on an official's economic interest is indistinguishable from its effect on the public generally in certain instances, including when the decision is made by the governing board of a water, irrigation, or similar district to establish or adjust assessments, taxes, fees, charges, or rates, among other decisions. The increase or decrease must be applied proportionally on the officials' interests as well as at least ten percent of the property owners or those receiving services from the agency. (Regulation 18707.2(c).)

You state that there are 4,305 accounts within the District, of which 429 are irrigation customers. Thus, irrigation customers make up 10% of all accounts.<sup>4</sup> Assuming that rate increases or decreases are applied on a proportional or "across-the-board" basis, under Regulation 18702.2(c), neither Ms. Van Wingerden nor Mr. Roberts has a disqualifying conflict of interest.

### **Step 8. Legally Required Participation**

Because the "public generally" exception applies, we do not address the "legally required participation" exception.

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<sup>4</sup> 9.96% rounded off to 10%.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Valentina Joyce  
Counsel, Legal Division

VJ:jgl